

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN J. McANDREWS

CIVIL ACTION

NO. 97-1145

v.

JOSEPH W. CHESNEY, et al.

MEMORANDUM

Broderick, J.

March 23, 1998

Petitioner John J. McAndrews is currently incarcerated at the State Correctional Institution in Frackville, Pennsylvania. On February 14, 1997, petitioner filed a counseled petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which he alleges nine separate grounds for relief, set forth below. The United States Magistrate Judge to whom the petition was referred filed a Report and Recommendations on August 28, 1997 recommending that the petition be denied. The petitioner's counsel filed timely objections to each one of the Magistrate Judge's findings and requested leave to amend the petition to claim ineffective assistance of state habeas counsel. Having conducted a de novo review, the Court will approve and adopt the Magistrate Judge's Report and Recommendations, deny the petition for a writ of habeas corpus, and deny the petitioner's request to amend his petition.

I. BACKGROUND

On April 11, 1978, a jury sitting before the Honorable Juanita Kidd Stout of the Court of Common Pleas of Philadelphia County convicted the petitioner of first degree murder and possession of an instrument of crime. After post-trial motions were denied, the petitioner was sentenced to life imprisonment on the first degree murder conviction and to a concurrent term of two and one-half to five years imprisonment for possession of an instrument of crime.

The judgment of conviction and sentence were affirmed by the Pennsylvania Supreme Court. Commonwealth v. McAndrews, 494 Pa. 157, 430 A.2d 1165 (1981). The Supreme Court summarized the facts and evidence supporting the petitioner's conviction as follows:

On the evening of October 31, 1977, appellant, who had been living intermittently with the victim and her three and one-half year old daughter, arrived at her apartment with a friend, Daniel Shillingford ("Shillingford"). Upon their arrival, appellant and the victim began arguing in the living room. The two then proceeded to the bedroom where the argument continued outside the hearing of Shillingford. Shortly thereafter, upon hearing a gunshot in the bedroom, Shillingford rushed in and observed the victim wounded and lying on the bed. Appellant and Shillingford then left the apartment. The following day, after appellant surrendered to police, he was arrested and charged with murder, possession of an instrument of crime, and possession of an offensive weapon.

At trial, the evidence conclusively established that appellant pressed the muzzle of a gun against the victim's cheek, pulled the trigger, and shot her through the head. The deputy medical examiner testified that it was evident from the nature of the wound and the powder burns on the skin of the victim that at the time the fatal shot was fired, the gun was being held with moderate to light pressure against her cheek. Furthermore, appellant himself took the stand

and admitted pointing the gun at the victim's cheek, pulling the trigger, and shooting her[,] [t]hough appellant claimed that he thought the gun was unloaded and that the shooting was accidental

McAndrews, 494 Pa. at 160, 430 A.2d at 1166.

II. CLAIMS PRESENTED

The petition for a writ of habeas corpus and accompanying brief present the following nine claims: (1) trial counsel was ineffective for failing to investigate and present available evidence of voluntary intoxication and diminished capacity; (2) trial counsel was ineffective for failing to preclude the introduction of prior criminal conduct, for introducing that conduct as substantive evidence, and for failing to object to the prosecutor's cross-examination regarding said criminal conduct; (3) appellate counsel was ineffective for failing to identify, brief or argue appealable issues of merit from the trial; (4) trial counsel was ineffective for failing to request a mistrial when the jury was permitted to continue deliberations and reach a verdict after a juror stated her refusal to be sequestered for another night; (5) the cumulative effect of the errors alleged herein deprived McAndrews of a fair trial; (6) trial and appellate counsel were ineffective for failing to preserve the issues raised herein; (7) McAndrews' Sixth and Fourteenth Amendment rights were violated by the Commonwealth's manipulation and non-disclosure of evidence; (8) trial counsel was ineffective for failing to object to the use of a handgun in a graphic

demonstration without adequate foundation; and (9) trial counsel was ineffective for failing to object to the admission of inadmissible hearsay.

The petitioner filed timely objections to each one of the Magistrate Judge's findings on these claims, so that the Court will review each claim in accordance with 28 U.S.C. § 636(b)(1)(C).

III. DISCUSSION

As the Magistrate Judge recognized, a federal court will not ordinarily address the merits of claims presented in a habeas petition unless "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). Although McAndrews' petition contains both exhausted and unexhausted claims, this Court agrees with the Magistrate Judge that McAndrews' "mixed" petition should be denied rather than dismissed, because the unexhausted claims are procedurally barred and the exhausted claims will be denied on the merits.

A. Procedural Default

Having conducted a thorough and independent review of the Magistrate Judge's findings, the Court agrees with the Magistrate Judge that the petitioner's first, second, third, fourth, fifth, and sixth claims are procedurally defaulted. Furthermore, although the Magistrate Judge reached the merits of the

petitioner's unexhausted seventh claim and denied it on the merits, this Court finds that the petitioner's seventh claim is also procedurally defaulted.

The petitioner brought two challenges to his conviction in the state courts. After trial he pursued a direct appeal to the Pennsylvania Supreme Court, which affirmed the trial court. Commonwealth v. McAndrews, 494 Pa. 157, 430 A.2d 1165 (1981). In 1983, the petitioner sought collateral relief pursuant to the then-named Pennsylvania Post Conviction Hearing Act ("PCHA"), 42 Pa. C.S.A. §§ 9541 et seq. (Purdon's 1982) (superseded and replaced by the Post Conviction Relief Act in 1988). On February 29, 1984, the PCHA court dismissed the petition without a hearing on the ground of laches, and subsequently denied a petition for reconsideration on November 7, 1984. On January 28, 1987, the Superior Court vacated the PCHA court's order dismissing the petition and remanded for an evidentiary hearing. Commonwealth v. McAndrews, 360 Pa. Super 404, 520 A.2d 870 (1987) (en banc). After an evidentiary hearing before the Honorable Joseph I. Papalini, the PCHA court again denied McAndrews' request for relief and dismissed his petition on August 15, 1994. The Superior Court affirmed the denial of post conviction relief, Commonwealth v. McAndrews, 447 Pa. Super 630, 668 A.2d 1194 (Aug. 2, 1995) (table), and the Pennsylvania Supreme Court denied the petition for allowance of appeal. Commonwealth v. McAndrews, 543 Pa. 725, 673 A.2d 332 (Feb. 16, 1996) (table).

The petitioner raised his first, second, and third claims in

his Superior Court appeal from the denial of post-conviction relief, but abandoned them in his petition for allowance of appeal to the Pennsylvania Supreme Court. Thus, these claims are unexhausted. However, the exhaustion requirement may be excused if it would be futile for the petitioner to seek relief in the state court system. Lambert v. Blackwell, 134 F.3d 506, 518 (3d Cir. 1997); 28 U.S.C. § 2254(b)(1)(B)(i) and (ii). "Futility may be encountered where exhaustion is impossible due to procedural default" Id.

This Court agrees with the Magistrate Judge that Pennsylvania law "clearly forecloses state court review" of the petitioner's first three claims, so that exhaustion of these procedurally defaulted claims is excused. Id. at 519 (citing Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993)). Any petition McAndrews might file with the PCRA court would be considered successive and untimely. See Commonwealth v. Lawson, 519 Pa. 504, 549 A.2d 107 (1988); 42 Pa.C.S.A. § 9545(b). Moreover, these claims would be considered previously litigated. Under the PCRA, "[a]n issue will be deemed previously litigated when 'the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue'" Commonwealth v. Morales, 701 A.2d 516, 520 (Pa. 1997) (quoting 42 Pa.C.S.A. § 9544(a)(2)). The Superior Court, which is the highest appellate court in which the petitioner could have had review as a matter of right in Pennsylvania, has already ruled on the merits of the petitioner's

first three claims, so that they have been previously litigated. Pennsylvania law clearly forecloses review of these claims, since post-conviction relief is not available based on a claim of ineffective assistance of counsel if the underlying claim was previously litigated. Lambert, 134 F.3d at 522. Accordingly, the exhaustion requirement will be excused for the petitioner's first, second, and third habeas claims, which are procedurally defaulted.

The petitioner raised his fourth habeas claim in his direct appeal to the Pennsylvania Supreme Court. This claim is also procedurally defaulted, since the Supreme Court ruled that it was waived because McAndrews failed to make a timely request for a mistrial. Commonwealth v. McAndrews, 494 Pa. at 163, 430 A.2d at 1167. Although the Pennsylvania Supreme Court ultimately addressed the merits of this claim, it did so only after a determination of waiver. Id. As the Magistrate Judge correctly ruled, where a state court relies upon a petitioner's failure to comply with a state procedural rule as an alternative basis for denying a claim, the habeas court should rely upon the petitioner's procedural default as a basis for denying relief. Harris v. Reed, 489 U.S. 255, 264 n.10, 109 S. Ct. 1038, 1044 n.10 (1989); Sistrunk v. Vaughn, 96 F.3d 666, 673-75 (3d. Cir. 1996). Accordingly, the petitioner's fourth habeas claim is procedurally defaulted.

The petitioner's fifth and sixth habeas claims were not presented to any state court and are procedurally defaulted. The

petitioner has no avenue of relief through which he can present these claims to the state courts. Under the PCRA, a claim is waived if "the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state post-conviction proceeding." 42 Pa.C.S.A. § 9544(b). None of Pennsylvania's exceptions to the waiver rule, such as a prima facie showing of a miscarriage of justice, see Lambert, 134 F.3d at 520-22, are applicable in the instant case. Thus, the petitioner's fifth and sixth habeas claims are procedurally defaulted, and the exhaustion requirement will be excused because the petitioner "waived a PCRA claim [he] could have presented in an earlier proceeding but failed to do so." Id. at 518; see also Harris, 489 U.S. at 269, 109 S. Ct. at 1046 (O'Connor, J., concurring). Finally, as the Magistrate Judge correctly noted, even in the absence of a finding of default, the petitioner's fifth and sixth claims cannot be reviewed, since the petitioner has failed to identify particular issues which warrant habeas relief. "[B]ald assertions and conclusory allegations do not provide sufficient ground" for habeas relief. Zettlemoyer v. Fulcomer, 923 F.2d 284, 301 (3d Cir. 1991).

The Magistrate Judge recommended denial of the petitioner's seventh claim on the merits, despite finding that McAndrews had never raised the claim in the state courts. Although this Court agrees with the Magistrate Judge's conclusion that the petitioner's seventh claim fails on its merits, the claim is also procedurally barred because of waiver. Accordingly, for the

reasons set forth above in connection with the petitioner's fifth and sixth claims, the petitioner's seventh claim is procedurally defaulted and the exhaustion requirement will be excused.

This Court is barred from reviewing the petitioner's first, second, third, fourth, fifth, sixth, and seventh habeas claims, which he has defaulted in state court pursuant to an independent and adequate state procedural rule, unless "[he] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 2565 (1991). The Court agrees with the Magistrate Judge that the petitioner has not satisfied either of Coleman's requirements in connection with his first through sixth claims, and the Court makes the same ruling in connection with his seventh claim. The fact that the petitioner has failed to exhaust these claims does not alter this analysis. Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1. Accordingly, the Court is barred from reviewing the petitioner's first through seventh claims on their merits, and these claims will be denied.

B. Ineffective Assistance of Counsel

The petitioner's remaining habeas claims have all been properly exhausted, and will be considered on the merits. These claims -- eight and nine -- both allege ineffective assistance of counsel. The Court agrees with the Magistrate Judge's findings

on both of these claims that the petitioner has failed to satisfy the two-part standard announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Trial and appellate counsel were not ineffective for failing to raise the issues contained in these claims, since as the Magistrate Judge ruled, these issues were meritless and counsel cannot be deemed deficient for failing to raise them at trial or on appeal.

Moreover, the Superior Court addressed both of these claims in the petitioner's appeal of his denial of post-conviction relief. Commonwealth v. McAndrews, 447 Pa. Super. 630, 668 A.2d 1194 (Aug. 2, 1995) (table). The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, § 104(3), effective April 24, 1996, added a new section to § 2254, which provides that:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2). Since the Superior Court's findings on the issues raised by the petitioner's eighth and ninth claims are not contrary to United States Supreme Court precedent nor an unreasonable determination of the facts, they will be presumed correct and will not be overturned. 28 U.S.C. §

2254(d). Accordingly, the petitioner's eighth and ninth claims will be denied.

Finally, the petitioner's request to amend his petition to add claims for ineffectiveness of his PCHA counsel will also be denied. Under § 104(5) of the AEDPA, "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Even prior to the enactment of the AEDPA, the Supreme Court definitively ruled that "[t]here is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752, 111 S. Ct. at 2566; see also Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987); Tillet v. Freeman, 868 F.2d 106 (3d Cir. 1989). The Fourth Circuit panel decision upon which the petitioner relies, Mackall v. Murray, 109 F.3d 957 (4th Cir. 1997), has been vacated after rehearing en banc, and the law of that Circuit now confirms that a claim for ineffectiveness of state habeas counsel is barred from federal habeas review. Mackall v. Murray, 131 F.3d 442, 449 (4th Cir. 1997), cert. denied 118 S. Ct. 907 (1998). Accordingly, the petitioner's request to amend his petition to assert claims for ineffective assistance of state habeas counsel will be denied.

IV. CONCLUSION

For the foregoing reasons, the Court agrees with the Magistrate Judge's findings that the petitioner's first through sixth habeas claims are procedurally defaulted. The Court has also determined that the petitioner's seventh claim is procedurally defaulted. None of these claims can be reviewed under 28 U.S.C. § 2254, since the petitioner has not demonstrated cause for his procedural default and actual prejudice, nor that failure to consider the claims will result in a fundamental miscarriage of justice. The Court also agrees with the Magistrate Judge that the petitioner has failed to satisfy the Strickland test for his remaining claims concerning ineffective assistance of counsel. Accordingly, the Court will adopt the Magistrate Judge's Report and Recommendations on each of the petitioner's nine claims, with the exception of the seventh claim, which the Court has found is procedurally barred, and deny the petition for a writ of habeas corpus. The Court will also deny the petitioner's request for leave to file an amended petition.

An appropriate Order follows.

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ORDER

AND NOW, this 23rd day of March, 1998; after careful and independent consideration of the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254; after a de novo review of the Report and Recommendations of Peter B. Scuderi, United States Magistrate Judge, filed on August 28, 1997, the petitioner's objections thereto, and the respondents' response; and for the reasons set forth in the Court's Memorandum of this date;

IT IS ORDERED:

1. The Report and Recommendations is APPROVED and ADOPTED, with the exception that the petitioner's claim of prosecutorial misconduct is procedurally barred rather than denied on the merits.
2. The petition for a writ of habeas corpus is DENIED.
3. A certificate of appealability is not granted.
4. The petitioner's request for leave to amend his petition is DENIED.

RAYMOND J. BRODERICK, J.